

**UNITED STATES GOVERNMENT  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 13 CHICAGO, ILLINOIS**

**FAMILY HEALTH NETWORK, INC.,  
Employer**

**and Case 13-RC-21844**

**UNITED AUTOMOBILE AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF  
AMERICA (UAW),  
Petitioner**

**DECISION AND DIRECTION OF ELECTION**

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing on this petition was held on before a hearing officer of the National Labor Relations Board, herein referred to as the Board, to determine whether it is appropriate to conduct an election in light of the issues raised by the parties.<sup>1</sup>

**I.**

**Issues and Parties Positions**

The Employer (FHN), an Illinois non-profit, is engaged in the business of arranging assisted health care management for Medicaid eligible individuals. The threshold issue in this case is whether FHN is an Employer exempt from the Board's jurisdiction under Section 2(2) of the Act. FHN argues that it is not covered by the Board's jurisdiction because it is operating pursuant to an Illinois state statute which permits it to administer health care services to Medicaid eligible recipients. The Petitioner argues that FHN is not exempt from the Board's jurisdiction as it is not a political subdivision under the applicable test found in *NLRB v. Natural Gas Utility District of Hawkins County*, 402 U.S. 600 (1971).

Should FHN be found to be subject to Board jurisdiction, there exists an issue with respect to the petitioned-for unit. The Petitioner, UAW, seeks to represent a unit of all full time and regular part time marketing representatives. The Employer objects that this unit is inappropriate and instead contends that the unit must also contain the additional classification of member services representatives. It asserts that the member services representatives share such a strong community of interest with the marketing representatives that a unit without them would be inappropriate. To the contrary, Petitioner contends that marketing representatives utilize different skills, perform different types of work, report to different locations than member services representatives, and have little to no integration or interchange with the member service representatives, making the petitioned-for unit appropriate.

Based on the position of the parties to this case, the issues are:

Whether Family Health Network (FHN) is exempt from the jurisdiction of the National Labor Relations Board as a political subdivision of the State of Illinois.

If FHN is not a political subdivision of the State of Illinois, is the petitioned-for unit of marketing representatives appropriate, or does it necessitate the inclusion of the additional classification of the member services representatives.

1 Upon the entire record in this proceeding, the undersigned finds:

- a. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
- b. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.
- c. The labor organization involved claims to represent certain employees of the Employer.
- d. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Sections 2(6) and (7) of the Act.

## **II. Decision**

Based on the entire record of this proceeding and for the reasons set forth below, I find that FHN is an employer subject to the jurisdiction of the Board within the meaning of Section 2(2) of the Act, and that it is appropriate to process the instant petition.

Regarding the issue of the appropriateness of the unit, I find that the petitioned-for unit constitutes an appropriate unit and find that the member services representatives do not need to be included. Accordingly, IT IS HEREBY ORDERED that an election be conducted under the direction of the Regional Director for Region 13 in the following bargaining unit:

All full time and regular part time marketing representatives employed by the Employer, FHN, at its facility currently located at 910 West Van Buren Street, Chicago, Illinois, 60607, excluding all member service representatives, office clerical employees and guards, professional employees and supervisors as defined in the Act.

## **III. Statement of Facts**

Founded approximately thirteen years ago, FHN supplies medical services pursuant to a contract with the Illinois Department of Healthcare and Family Services ("DHFS"). Broadly speaking, FHN is a "managed care community network." It is in the business of arranging services for Medicaid-eligible women and children in Cook County, Illinois. FHN has a contract with the State of Illinois to handle Medicaid program obligations for which the State would normally be responsible. FHN first entered this relationship with the State about 12 years ago. Each contract is a three-year arrangement with an opener regarding the rates of payment at the end of two years.

FHN is governed by a Board of Directors comprised of Alan Channing, head of Sinai Health System; Michael O'Grady, CEO of Norwegian American Hospital; Elizabeth Stratten; President/CEO of St. Bernard Hospital; Dr. Henry Wiggins, an anesthesiologist/radiologist; Don Frank, who is in charge of managed care for Resurrection Healthcare System; and Phillip Bradley, President/CEO of Family Health Network. This Board of Directors has ultimate responsibility for the corporation. The Board is self-selecting and has terms for removal in their bylaws. The Board appoints the CEO.

Illinois state statute defines what managed care community networks like FHN must provide in terms of the services. The statute also defines how the State wishes those providers to conduct business, and provides for some oversight. For example, the State requires that FHN maintain a computer system which can be networked with DHFS computer system. Marketing plans must be approved by the State. The State also requires that a background check be conducted when hiring an individual so that it can be demonstrated that the applicant does not have any criminal history of fraud or other abuses.

However, in terms of setting conditions of employment of employees of FHN, its President/CEO Bradley handles decisions regarding the hours of work, salary and commission structures, disciplinary procedures, and fringe benefits. A caveat is that DHFS caps a marketing representative's bonus to 25% of their total compensation. On the other hand, FHN handles its own rules regarding disciplinary matters such as excessive absenteeism, tardiness and insubordination.

There are two employee classifications at issue. Marketing representatives (MRs) are subdivided into three sub classifications: Marketing Representative I, Marketing Representative II, and Marketing Representative III (also known as a Senior Rep). Currently, there are 36 representatives on staff. Each of the sub classifications perform the same general functions: "provid[ing] education to participants of the Healthcare and Family Services medical programs, explaining their healthcare options and the Family Health Network program. They complete the enrollment process of potential enrollees who elect FHN as their Healthcare option." The differentiation between the three sub categories relate to the quotas that each must meet per month. For example, Marketing Representatives I must meet or exceed the enrollment of 60 applications whereas Marketing Representatives II must meet or exceed the enrollment of 70 applications and Marketing Representatives III must meet or exceed the enrollment of 90 applications. Historically, if those quotas are met, bonuses are paid. Promotions occur when the employee exceed the quota for the next higher position for six consecutive months. For this they receive either a salary increase equivalent to the base of the next salary range or receive a 10% increase to their base pay, whichever is greater. The base salary range from \$23,000 to \$35,000 for a Marketing Representative I; \$39,000 to \$45,900 for a Marketing Representative II; and \$39,000 to \$59,900 for a Senior Rep. Marketing representatives are also paid a car allowance as they must drive their own vehicles to perform work.

The job requirements for the marketing representative classifications are, in relevant part, the same: a high school diploma or GED equivalent, a car and valid driver's license, previous sales experience, and a familiarity with Family Health Network's targeted population. To that end, marketing representatives generally perform their work out on the streets of Cook County. They approach mothers and children for the purpose of offering them the services of the Family Health Network program. Sometimes, they may be assigned a clinic or a WIC office from which they enroll members. To check in at the beginning of the day, most MRs meet their supervisor at his/her car which is parked daily at a vacant parking lot located at 6129 South Ashland, Chicago, Illinois. Some MRs are permitted to check in at the Employer's facility at 910 West Van Buren, Chicago, Illinois if it is closer to their home, for example. On their weekly training days, however, marketing representatives meet at the Employer's facility. Each MR sub classification is trained separately. State-mandated training occurs once per month.

Marketing Representatives are required to carry a cell phone as it is the mechanism by which potential enrollees can contact them if they have questions. Although FHN has cell phones for use by Marketing Representatives, most choose to carry their own cell phones.

The other classification at issue is the Member Service Representative (MSR). MSRs “provides efficient, courteous and knowledgeable response to inquiries from a variety of callers to the Member Service Department.” By contrast to the MRs, member service representatives are not required to have a valid driver’s license, vehicle, or cell phone. They are required to have a high school diploma or GED. MSRs are paid \$26,000 to \$44,000 per year, based on experience. There is no bonus structure in place for MSRs. Currently, there are seven on staff at FHN.

Member Service Representatives report to work in staggered shifts beginning at either 8, 8:30, or 9 a.m. and work an eight-hour shift at the Employer’s facility. Their work primarily consists of fielding phone calls that are generated from FHN’s toll free number. These calls are from current enrollees and relate to questions about benefits or can be about a new address, for example. Often, however, enrollees calls are made to and resolved by the MRs who are in the area and often give enrollees their personal phone number. Data entry to update records is also required of MSRs and, unlike marketing representatives, the job description for an MSR is that he or she must be able to “use computer keyboard and telephone headset for long periods of time” and type 35 words per minute.

In 2007, contact between the MRs and MSRs was reduced due to some changes making it possible for MRs to contact a client enrollment broker directly to check if an applicant was eligible for enrollment. Before this, the MRs would have to bring the application into the office and the MSRs would have to look up the information themselves.

As marketing representatives are in the field the majority of each day, they are not provided with workspace at the Employer’s facility, a desk, computer, or desk phone. There are a few exceptions as some marketing representatives are provided with laptop computers to use in the field. The record contains evidence of one individual who used to be employed as a MSR but who presently works as a MRs.

#### **IV. Analysis**

##### **A.**

##### **Jurisdiction**

Section 2(2) of the Act excludes from the definition of “employer” “...any State or political subdivision thereof.” To determine whether an entity is a political subdivision, the Board applies the test described in *NLRB v. Natural Gas Utility District of Hawkins County*, 402 U.S. 600, 604-05 (1971). The test in *Hawkins* provides that an entity is exempt from the Board’s jurisdiction as a political subdivision if it is either (1) created directly by the State so as to constitute a department or administrative arm of the government, or (2) administered by individuals who are responsible to public officials or to the general electorate. *Id.* at 604-05. As explained below, applying this test I find that FHN is not a political subdivision of the State of Illinois.

First, the record clearly establishes that FHN does not fall within the first prong of the *Hawkins* test because it was not created directly by the State of Illinois so as to constitute a department or administrative arm of the government. As the Board stated in *Research Foundation of the City University of New York*, 337 NLRB 965, 968 (2002), “[t]he creation of the Employer by private individuals as a private corporation, without any state enabling action or intent, clearly leaves the Employer outside the ambit of the Section 2(2) exemption.”

Like the employer in *Research Foundation*, FHN was formed by private individuals pursuant to a state law, and is legally and financially separate from the State. It has an independent Board which is self-perpetuating and governs such subjects as hiring and firing. The contract between the State and FHN clearly specifies that employees of FHN are not employees of the State. The contract also defines the State’s relationship with FHN as a “contractor” that by statute “provides or arranges primary secondary or tertiary managed care services under contract with the Illinois Department exclusively to persons participating in programs managed by the Illinois Department.” However, this relationship of being a “contractor” to the State of Illinois does not make FHN a department or administrative arm of the State so as to escape the Board’s jurisdiction. In short, the evidence is clearly demonstrated that neither Illinois nor any of its political subdivisions or agencies created the Employer and as such FHN fails the first prong of the *Hawkins* test.

Second, I find that FHN is not exempt under the second prong of the *Hawkins* test. In *Charter School Administration Services, Inc.*, 353 NLRB No. 35, slip op. at p.4 (2008) (citing *Research Foundation*, 337 NLRB at 969), the Board provided that the relevant inquiry in determining if an entity is “administered” by individuals responsible to public officials or to the general electorate, is whether the individuals who administer the entity are appointed by and subject to removal by public officials. In *Charter School Administration Services*, the Board found that a private, for-profit Michigan corporation, engaged in the management of charter schools, was not exempt from the Board’s jurisdiction because the Employer’s board of directors were appointed by and subject to removal only by private individuals and not by public officials. *Id.* at p.5.

Similarly, there is no evidence that the FHN board of directors are directly responsible to any public official or to the general electorate within the meaning of *Hawkins County*. The FHN Board members themselves choose who is on the Board. The State has no authority to choose who sits on the Board. They are self-appointed and subject to removal only by a procedure established by its own bylaws or because their eligibility lapsed if they didn’t meet the requirement of being connected with a licensed provider, but not by any other method. FHN’s CEO, Phillip Bradley is appointed by FHN Board and is only subject to removal by the Board itself, not the State of Illinois. While the record does contain evidence that the State Attorney General “monitors” who is on the Board members, there is no evidence of monitoring beyond the identity of Board members. Such evidence is insufficient to establish that the Employer is administered by public officials to exclude it from the Board’s jurisdiction. Indeed the Board has found that it is not enough to demonstrate that the State “approved” of the Board appointments. *Cape Girardeau Care Center*, 278 NLRB 1018, 1019 (1986).



Compared to other occasions when the Board has declined to assert jurisdiction, FHN falls short of either the state statutory designation or the oversight that are necessary for a finding of a political subdivision. For example, in *State Bar of New Mexico*, 346 NLRB 674 (2006), the Board declined to assert jurisdiction because the State Bar had been directly created by state statute and had authority to “assist in the regulation of the legal profession.” *Id.* at 676. So too in *New Britain Institute*, 298 NLRB 862 (1990), a public library was directly created and named in the state statute, necessitating exemption from Section 2(2). Using the second prong, the Board declined to assert jurisdiction in *Spectrum Healthcare Services, Inc.*, 325 NLRB 1061 (1998) because it determined that simply having general oversight by public officials was not enough unless it could be shown that it was directly administered by those public officials. While it is true that the State does make some provisions in terms of who FHN may hire in a general sense and does ensure that FHN is following budget and auditing procedures, it does not follow that these requirements make FHN a political subdivision by the Board’s rationale.

It is also clear on the record that FHN is an employer within the meaning of Section 2(2) of the Act as it controls some matters relating to the employment relationship involving the petitioned-for employees. *Management Training Corp.*, 317 NLRB 1355, 1358 (1995) Here, the evidence is clear that FHN, ultimately by Bradley, maintains control over critical aspects of the terms and conditions of its employees, as well as the management structure, labor relations, and the day-to-day operations. As in *Research Foundation*, the fact that FHN submits reports related to budget and marketing as part of its contractual relationship with the State of Illinois does not demonstrate any significant control by the government. 337 NLRB at 968-69. Admittedly, there are general state guidelines such as limitations on hiring an individual with a criminal background demonstrating fraudulent behavior, requiring that marketing personnel must hold a valid drivers license, and must not have engaged in marketing activities for any other similar managed care organization that has a contract with the State, and must not have been fired by any other provider in the past 12 months. FHN is prohibited from hiring anyone who took early retirement from the State of Illinois. Likewise, the state can request an investigation if a complaint is lodged against a marketing representative through the hotline operation in Springfield, IL. However, there is only one instance in the record where the state identified that a marketing representative was fraudulently enrolling people and so FHN terminated the individual, at the state’s recommendation. Other than that, no record exists that anyone at the Illinois Department of Healthcare and Family Services or from the State General Assembly has had any involvement in the hiring or removal of anyone on FHN’s staff.

Given that FHN was neither created by statute nor is responsible to public officials or the Illinois General Assembly, the evidence is clear that it is subject to the Board’s jurisdiction as it is an “employer” within the meaning of Section 2(2) of the Act.. In so doing, I decline to find that there are valid public policy reasons to apply the standard as set forth in *Res-Care, Inc.*, 280 NLRB 670 (1986), as recommended by the Employer. In *Res-Care*, the Board declined to assert jurisdiction over private entities operating under contracts with government bodies if it was shown that the government control over the operation was “so extensive” that the private employer lacked final authority over wages and benefits of the unit employees. *Res-Care* is no longer good law following the Board’s decision in *Management Training*, Supra.

## **B. Appropriateness of the Unit**

In making assessments about the appropriateness of the unit, the Act does not require that the bargaining unit sought by the Petitioner be the only appropriate unit, or the ultimate unit, or even the most appropriate unit. The Act only requires that the petitioned-for unit be an appropriate one, such that employees are insured “the fullest freedom in exercising the rights guaranteed by this Act.” *Overnite Transportation Co.*, 322 NLRB 723 (1996); *Tallahassee Coca-Cola Bottling Co.*, 168 NLRB 1037 (1967); *Morand Beverage Co.*, 91 NLRB 409 (1950) *en’d*. 190 F.2d 576 (7th Cir. 1951). The burden is on the party challenging the unit to show that the petitioned-for bargaining unit is inappropriate; if the unit sought by the petitioning labor organization is appropriate, the inquiry ends. *P.J. Dick Contracting, Inc.*, 290 NLRB 150, 151 (1988). A unit is appropriate where employees in the unit have a separate community of interest from other job classifications. In determining this community of interest, the Board examines such factors as wages, hours and working conditions, commonality of supervision, degree of skill and common functions, frequency of contact and interchange with other employees, and functional integration. *Boeing Co.*, 337 NLRB 152, 153 (2001).

In this case, the petitioned-for unit consists of marketing representatives. However, the Employer claims that this unit necessitates the inclusion of the additional classification of the member services representatives in order to be appropriate. Upon the record evidence in this case, I find that the petitioned-for unit consisting of the Employer’s marketing representatives has a separate community of interest and constitutes an appropriate unit for the purposes of collective bargaining.

The record shows that the marketing representatives have a separate community of interest from other employees. Specifically, marketing representatives have a quota system and bonus structure and work in the field. Their work hours are not necessarily set and sometimes they work well past 5 p.m. Further, marketing representatives are required to attend training meetings once or twice per week. Other than these trainings, however, marketing representatives spend little to no time in the office. Marketing representatives are also required to be registered with the State of Illinois.

By contrast, the member services representatives do not have a quota requirement and bonus structure, they have a defined work schedule, spend their entire work day in the office, and do not have to meet any state registration requirements. The job duties for marketing representatives differ greatly from those of the member service representatives. Member service representatives spend their time answering calls from enrollees and doing data entry from the Employer’s facility whereas marketing representatives are out in the field attempting to enroll individuals in the Family Health Network. Marketing representatives must have a valid driver’s license and a vehicle at their disposal to perform this work, whereas member service representatives do not have these requirements. Marketing representatives and member service representatives do not share common supervision or direction. Thus, record testimony showed that marketing representatives are supervised by Colleen Everett, Marketing Manager. Everett in turn reports to Jacqueline Washington, Director of Marketing. By contrast, member service representatives are supervised by Socorro Vega, who reports to Aiesha Morgan, Member Service Manager. Based upon the Company’s organizational chart, these two departments, Marketing and Member Services, are separate.

Furthermore, there is little daily contact between the two classifications. Both classifications spend only a small portion of their time working together if the need arises. For example, due to their weekly training, marketing representatives report to the Employer's facility once weekly. However, besides being under one roof once a week, the two do not converse with one another in person. The only contact they have with one another is generally via phone. The fact that these two classifications spend a portion of their time working together on a periodic basis does not mandate the inclusion of the member service representatives in the petitioned for unit in view of the significant differences in fundamental duties and working conditions described above.

Beyond the one example of a marketing representative who used to be a MSR, there was no other record evidence regarding any interchange between MSRs and marketing representatives. This is likely the result of the fact that a MSR does not possess the certification from the state that a marketing representative is required to have. Thus, this negligible evidence of interchange is evidence that the marketing representatives have their own separate community of interests.

In short, marketing representatives and member service representatives possess different supervision, skill sets, work in different locations, and have different terms and conditions of employment. In addition, there is little evidence of interchange or functional integration. For those reasons, I find that the marketing representatives constitute an appropriate unit for collective bargaining.

#### **V. Direction of Election**

An election by secret ballot shall be conducted by the undersigned among the employees in the unit(s) found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit(s) who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by United Automobile Aerospace and Agricultural Implement Workers of America (UAW).

## **VI. Notices of Election**

Please be advised that the Board has adopted a rule requiring election notices to be posted by the Employer at least three working days prior to an election. If the Employer has not received the notice of election at least five working days prior to the election date, please contact the Board Agent assigned to the case or the election clerk.

A party shall be estopped from objecting to the non-posting of notices if it is responsible for the non-posting. An employer shall be deemed to have received copies of the election notices unless it notifies the Regional Office at least five working days prior to 12:01a.m. of the day of the election that it has not received the notices. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure of the Employer to comply with these posting rules shall be grounds for setting aside the election whenever proper objections are filed.

## **VII. List of Voters**

To insure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is directed that 2 copies of an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of this Decision. *North Macon Health Care Facility*, 315 NLRB 359, fn. 17 (1994). The Regional Director shall make this list available to all parties to the election. In order to be timely filed, such list must be received in Region 13's Office, 209 South LaSalle Street, 9th Floor, Chicago, Illinois 60604, on or before **July 1, 2009**. No extension of time to file this list will be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

## **VIII. Right to Request Review**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street NW, Washington, DC 20005-3419. This request must be received by the Board in Washington by **July 8, 2009**.

In the Regional Office's initial correspondence, the parties were advised that the National Labor Relations Board has expanded the list of permissible documents that may be electronically filed with its offices. If a party wishes to file one of the documents which may now be filed electronically, please refer to the Attachment supplied with the Regional Office's initial correspondence for guidance in doing so. Guidance for E-filing can also be found on the National Labor Relations Board web site at [www.nlrb.gov](http://www.nlrb.gov). On the home page of the website, select the **E-Gov** tab and click on **E-Filing**. Then select the NLRB office for which you wish to E-File your documents. Detailed E-filing instructions explaining how to file the documents electronically will be displayed.

DATED at Chicago, Illinois this 24<sup>th</sup> day of June, 2009.

/s/ Arly Eggertsen

Arly W. Eggertsen, Acting Regional Director  
National Labor Relations Board  
Region 13  
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CATS – Jurisdiction – Statutory Exempted Employer

Blue Book – 177-1683-5000; 420-2906; 420-2918; 420-2936

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